

## The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and the Effect on Electronic Communication Service Providers

*On July 10, 2008, the President signed H.R. 6304, the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (“The Act”), expanding the federal government’s power to conduct foreign intelligence surveillance. This bill was recently passed by the Senate on July 9, 2008, and the House of Representatives on June 20, 2008. H.R. 6304 went into effect on July 10, 2008.*

The bill amends the Foreign Intelligence Surveillance Act of 1978 to provide the U.S. Attorney General and the federal intelligence community with expanded power to conduct foreign surveillance, including the ability to conduct surveillance, on an emergency basis, without prior judicial oversight. The Act also provides lawsuit protection for electronic communication service providers that assist the government and creates retroactive immunity for activities undertaken since September 11, 2001 by service providers that helped the government investigate terrorism.

In general, H.R. 6304 allows the government to gather electronic intelligence on both foreign individuals located outside the United States and United States citizens located outside the country if there is probable cause that the United States citizen is acting for a foreign agent in an illegal capacity. The Attorney General, jointly with the Director of National Intelligence, are permitted to carry out these powers without prior judicial approval when important national security intelligence could be lost without immediate action. The Foreign Intelligence Surveillance Court (“FISC”)

will have jurisdiction over the review of foreign surveillance activities.

### H.R. 6304’S EFFECT ON ELECTRONIC COMMUNICATION SERVICE PROVIDERS

H.R. 6304 amends the Electronic Communications Privacy Act – the general federal wiretap statute – to bring actions conducted pursuant to H.R. 6304 under the umbrella of lawful and protected surveillance practices. Through an order of the Attorney General and the Director of National Intelligence, electronic communication service providers can be compelled to immediately aid the government in collecting information on a targeted individual. Procedures for conducting this electronic surveillance are described in the Electronic Communications Privacy Act and include (1) assisting the government with intercepting wire, oral, or electronic communications; (2) accessing wire and electronic communications stored in electronic form and stored customer communications and records; and (3) installing and using pen registers and trap and trace devices.

Electronic communication service providers that believe the Attorney General and Director of National Intelligence are unlawfully exercising their emergency powers may petition for FISC to immediately review such action. A FISC judge must issue a preliminary ruling within six days, indicating whether the Attorney General and Director of National Intelligence acted within the scope of the powers provided by this Act. If the judge believes a service provider’s petition requires further review, FISC has 30 days to issue a ruling. Failure to follow the ruling of this court could result in a contempt of court charge for the service provider.

### **WHO ARE ELECTRONIC COMMUNICATION SERVICE PROVIDERS UNDER H.R. 6304?**

According to this Act, an electronic communication service provider includes:

- A telecommunications carrier, as that term is defined under the Telecommunications Act of 1934;
- A provider of an electronic communication service or of a remote computing service, as that term is defined under the Electronic Communications Privacy Act of 1986;
- Any other communication service provider who has access to wire or electronic communications;
- A parent, subsidiary, affiliate, successor, or assignee of an entity described above; or
- An officer, employee, or agent of an entity described above.

### **ELECTRONIC COMMUNICATION SERVICE PROVIDERS RECEIVE IMMUNITY FROM LIABILITY**

Service providers, acting through an order issued under this Act, are released from legal liability for providing any information, facilities, or assistance to the government. Provisions in the Act release a service provider from both federal and state, civil and criminal liability.

In addition to service provider protection for future surveillance activity, the Act's provisions will apply retroactively—providing for the dismissal of numerous pending lawsuits over electronic surveillance conduct. Such cases must be dismissed if the service provider can show that surveillance activity was (1) conducted pursuant to a lawful Presidential order; (2) administered in connection with an intelligence activity designed to detect or prevent a terrorist attack; and (3) involved an order that was authorized between September 11, 2001 and January 17, 2007.

If you have any questions or concerns regarding provisions of this Act please do not hesitate to contact the undersigned or any of the attorneys in Kelley Dye & Warren's Telecommunications Practice Group.

**For more information about this Client Advisory, please contact:**

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